

proper. Regardless, even if these 10 references are combined in the manner set forth in the Office Action, they still fail to disclose or suggest the claimed invention.

The claimed invention provides in Claims 1-9, a canned pet food and in Claim 10 a process for producing a canned pet food. Independent Claim 1 claims a base layer including solid pieces in gravy and an upper layer comprising a substantially solid food stuff capable of supporting the base layer when the pet food is inverted. Independent Claim 10 claims a process comprising filling a base layer comprising solid food pieces in a gravy, filling an upper layer into the can wherein each of the base layer and upper layer has a viscosity falling within a specific range. In the claimed invention, the layers are structured and ordered so that when an open can is tipped to release the contents, the contents emerge in their entirety. The solid layer is designed to emerge first and settles in the dish. The emergence of the solid layer is encouraged by the fluidity of the lower layer of chunks and the gravy behind it. The gravy and chunks then follow to form a layer on top of the solid layer, and possibly spilling down its sides. This layer is inherently more stable and reduces the risk of creating a mess upon opening the can.

As set forth in detail below, the cited art fails to disclose or suggest the claimed invention.

The principal reference relied upon by the Office Action is *Ohba*. *Ohba* fails to disclose or suggest the ability of the upper layer, on inversion, to support the base layer. Nor does *Ohba* disclose or suggest that the base layer, before inversion, includes solid food pieces in gravy. *Ohba* only teaches that different food varieties having substantially the same structural characteristics should be included in the can. In this regard, *Ohba* is only concerned that the order in which the food is eaten by the pet is varied (see column 2, lines 16-22). If anything, *Ohba* teaches away from the claimed invention in that it is not desirable to have an upper and

base layer as in the claimed invention as this reduces the capacity to vary the order of layers for the pets. *Ohba* does not disclose nor suggest the base layer and upper layer as specifically claimed in Claims 1-10.

Applicants note that the claimed invention is not merely a chunk and gravy product. Rather, it is a product that maintains its structural integrity as well as separation of one product phase from another. The claimed invention allows the consumer to tip the can over allowing the product to maintain its structural integrity. For example, if the layers were reversed, in tipping out the contents by the consumer, the chunks and the gravy would emerge first. The solid layer would then follow and would thereby attempt to be perched on top of the loose chunks. This would provide an inherently unstable product with unpredictable results. Not only would the resultant product not be appealing as in the claimed invention, it is also easy to imagine that the solid layer would remain in the bottom of the can upon the can being inverted. Therefore, it may be necessary to dig out the product with a spoon, fork, or other implement.

To help remedy the deficiencies of *Ohba*, the Patent Office relies on *Poppel*. However, *Poppel* is not prior art to the claimed invention. In this regard, *Poppel* is a PCT application bearing a publication date of January 30, 1997. In contrast, the claimed invention claims priority to provisional applications filed on August 6, 1996 and January 24, 1997. Thus, *Poppel* is not prior art to the claimed invention. This, in and of itself, demonstrates that the rejection is not proper.

The remaining references do not remedy the deficiencies of *Ohba* set forth above.

With respect to the *Quaker* reference, *Quaker* does not provide any layered structure at all. Although it teaches the manufacture of a two phase product, neither phase comprises individual solid chunks in a substantially flowable medium. Indeed, in *Quaker*, one of the phases

is completely surrounded by the other phase. This is set forth as being an essential feature of *Quaker*. This, therefore would direct one skilled in the art away from the claimed invention. Moreover, it is not seen where the suggestion is in the art to modify *Ohba* in view of *Quaker*.

The *McMahon* reference does not deal with pet foods. Although it contemplates meat-based products, it provides a product wherein each can provides several identical servings though they have a vertical separation of components. In contrast to the claimed invention, *McMahon* is not concerned with a single serving having a specifically desired structure. Instead, *McMahon* provides a two-phase food product wherein the phases are separated along a substantial axial interface in the can. Thus, *McMahon* is not concerned with issues that are created by a horizontally layered structure that is designed so that its contents are dispensed into a dish or other container. In contrast to the claimed invention, which is designed to be inverted into a dish and maintain its attractive appearance, *McMahon* is satisfied with an attractive appearance only at the time the can is opened. See page 2, line 61 to page 3, line 5. Instead of inverting and dumping the can into a dish, in *McMahon* the concern is with spooning out the phases in a uniform manner. See page 2, lines 62-64. Thus, *McMahon* is not concerned with maintaining a vertically based configuration upon inverting the can.

Although *McMahon* may state that one phase can contain fruit chunks in a sauce, this does not address the issue of how to dispense them so the chunks lie on top of an underlying solid phase. Contrary to the Office Action's statement, *McMahon* does not evidence that phases may vary as desired. In fact, *McMahon* discloses to one skilled in the art that careful consideration has to be given to the various parameters and properties of the phases to avoid undesirable consequences such as intermixing. Further, vertically oriented separated phases do not address or suggest the issues that apply to horizontal interfaces. In this regard, gravitational

effects must be considered with respect to horizontal interfaces as opposed to the vertical interfaces of *McMahon*. *McMahon* does not even suggest how these issues should be dealt with.

Hillebrand, similar to *McMahon* is concerned with the appearance of the product in the container and not with the appearance of the contents when they are emptied from the container. *Hillebrand* is not concerned with a product that is dispensed into one complete meal. Therefore, *Hillebrand* is not concerned with the inversion of the can but, again similar to *McMahon*, provides a product that is designed to be scooped out of the container in appropriate portions. Hence, *Hillebrand* is not concerned with the structure of the present invention that allows a container to be inverted and dispensed into a dish maintaining its structural integrity.

When these references are combined with *Ohba*, one does not achieve the claimed invention. For example, all of the references fail to disclose or suggest the horizontally oriented claimed product.

Nor do the *QP Corp* references remedy the deficiencies set forth above. Each of these references is concerned with bread-spread compositions in a container. By definition the spreads would be removed in small, discrete quantities. Thus, the issues that are faced by the claimed invention in providing a complete meal that can be attractively dispensed in its entirety from a can are not a concern with these references. Neither of these references are concerned with how the product is dispensed from the container but, rather the concern is with putting them in an attractive position within the container.

With respect to *QP Corp* ('677), it should be noted that the viscosity of the components are 10-100 times greater than the components of the claimed invention. Thus, this product is not capable of being withdrawn from the container except by scooping small portions out with a

suitable utensil. By contrast, the claimed invention can be dispensed from the container by inversion.

With respect to *Errass*, this reference relates to a product, specifically a condiment, that is dispensed from a tube. Nothing is disclosed in *Errass* with respect to horizontal layering.

And finally, *Henkel* relates to a cosmetic, not a food. Applicants respectfully submit that this reference would not even be considered by one skilled in the art. Regardless, the reference does not disclose horizontally disposed layers. Therefore, *Henkel* does not remedy the deficiencies noted above.

In conclusion, Applicants respectfully submit that the obviousness rejection is based on an improper application of the law and facts. For example, with respect to independent Claim 1, none of the cited references, either alone, or in combination, suggest the property of support on inversion of the base layer in the can. This is a specific limitation of Claim 1 that is not disclosed nor suggested. Specifically with respect to *Ohba*, this reference merely teaches layers but does not contemplate including chunks of food in a fluid as one of the layers. Indeed, *Ohba* teaches that the layers should be of a similar kind of texture and structure to provide versatility/reversibility in order of eating. The remaining references do not remedy the deficiencies of *Ohba*. With respect to the claims that depend from independent Claim 1, these claims add additional features that Applicants submit are neither disclosed nor suggested by the prior art in combination with the elements of Claim 1.

With respect to method Claim 10, Applicants respectfully submit that clearly the cited references fail to disclose or suggest the claimed method. Not one of the cited references suggests the claimed order of filling a can. Indeed, the references fail to disclose or suggest that

the order of filling the can is important in order to obtain the desired structure on emptying out the contents of the can.

Accordingly, Applicants respectfully submit that the rejection of Claims 1-10 as being obvious be withdrawn.

For the foregoing reasons Applicants respectfully request reconsideration of their patent application and earnestly solicit an early allowance of same.

Respectfully submitted,



(Reg. No. 30,142)

Robert M. Barrett
BELL, BOYD & LLOYD LLC
P.O. Box 1135
Chicago, Illinois 60690-1135
Tel: (312) 807-4204
ATTORNEY FOR APPLICANTS